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(Slip Opinion)

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BEFORE THE ENVIRONMENTAL APPEALS BOARD
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C.

In re:	)	
Outboard Marine Corp.,	)	CERCLA Penalty Appeal No. 95-1
Respondent.	)	

[Decided October 11, 1995]

ORDER DISMISSING APPEAL

Before Environmental Appeals Judges Ronald L. McCallum and Edward E. Reich.

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OUTBOARD MARINE CORP.

CERCLA Penalty Appeal No. 95-1

ORDER DISMISSING APPEAL

Decided October 11, 1995

Syllabus

On July 25, 1995, the Presiding Officer issued an initial decision in *In re Outboard Marine Corp.*, finding liability and assessing a civil penalty against the respondent in the amount of $16,961 for one count of violating the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. § 9601 *et seq.* The Regional Hearing Clerk for U.S. EPA Region V served the decision upon the Assistant Regional Counsel for Region V by interoffice mail on August 3, 1995. On August 24, 1995 (twenty-one days after service of the initial decision), the Board received from Region V a notice of appeal and a motion seeking an extension of time to file its appeal brief and other materials required by 40 C.F.R. § 22.30. Because 40 C.F.R. § 22.30(a)(1) requires appeals to be filed within twenty days after service of the initial decision, the Board issued an order to Region V requiring it to show cause why its appeal should not be dismissed as untimely. The Region contends that the appeal is timely because although the Regional Hearing Clerk placed the decision in interoffice mail on August 3, 1995, it was not received in the Office of Regional Counsel until August 4, 1995.

Held: The Region's notice of appeal and motion are untimely and must be dismissed. Absent extraordinary circumstances, appeals must be received by the Board within twenty days of service of the initial decision in order to be timely. Service of an initial decision is complete as of the date the Regional Hearing Clerk certifies that it was served "personally," or "upon mailing" when the decision is served by certified mail. To accept the Region's claim (that service by interoffice mail is not complete until the decision is received by the Regional attorney) contravenes the intent of the rules, which is to provide the parties and the Board with certainty in determining when appeals must be perfected. It is therefore reasonable to construe service by interoffice mail as a type of service made "personally," and complete as of the date the Regional Hearing Clerk certifies the initial decision was placed in interoffice mail. Because the Region's appeal was received twenty-one days after the Regional Hearing Clerk served the initial decision, and the Region has not established "extraordinary circumstances" justifying a waiver of the deadline, the appeal is untimely.

Before Environmental Appeals Judges Ronald L. McCallum and Edward E. Reich.

Opinion of the Board by Judge Reich:

On September 6, 1995, the Board issued an order to U.S. EPA Region V requiring the Region to show cause as to why its appeal in this matter should not be dismissed as untimely. On September 12, 1995, the Region submitted its response to the Board's order.[1] The respondent, Outboard Marine Corporation (OMC), filed an opposition to the Region's response on September 27, 1995. Upon consideration of the Region's response and OMC's opposition, and for the reasons explained below, the Board concludes that the Region's appeal must be dismissed as untimely.

[1]The Region's response was entitled "Motion for a Finding that Respondent [sic] Filed Its Notice of Appeal and a Motion for Extension of Time in a Timely Manner."

The Region's appeal stems from a complaint filed by the Region against OMC charging OMC with two counts of violating a consent decree and order issued pursuant to the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. § 9601 *et seq.* The complaint sought penalties totalling in excess of $475,000. On July 25, 1995, the Presiding Officer entered an initial decision in *In re Outboard Marine Corp.*, Docket No. V-W-91-C-123B, finding liability and assessing a civil penalty against OMC in the amount of $16,961 for one count.[2]

According to the Regional Hearing Clerk's certificate of service, the initial decision was served upon the Assistant Regional Counsel for Region V by interoffice mail on August 3, 1995, at 77 West Jackson Boulevard, Chicago, Illinois, and upon the other parties by certified mail. The Regional Hearing Clerk is located at 77 West Jackson Boulevard. The Region apparently furnished 77 West Jackson Boulevard as its appropriate service address, and concedes that all mail for Region V is routed through the central mail room at 77 West Jackson Boulevard.[3]

On August 24, 1995 (twenty-one days after service of the initial decision upon the Region), the Board received the Region's notice of appeal and a "Motion for Extension of Time to File and Serve Appellant's Brief with Affirmative Findings of Fact, Conclusions of Law, and Proposed Order," in which counsel for Region V sought an additional sixty days to file the briefs and other materials required by 40 C.F.R. § 22.30. The two-paragraph notice of appeal did not contain any of the elements required by the regulations to perfect an appeal.[4]

Pursuant to 40 C.F.R. § 22.30:

> Any party may appeal an adverse ruling or order of the Presiding Officer by filing a notice of appeal and an accompanying appellate brief with the Environmental Appeals Board and upon all other parties and amicus curiae *within twenty (20) days after the initial decision is served upon the parties*.

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[2]OMC has not appealed the initial decision.

[3]The Region furnished the same address to the Board for the service of orders in this matter.

[4]See 40 C.F.R. § 22.30(a)(1). That regulation states that "[t]he notice of appeal shall set forth alternative findings of fact, alternative conclusions regarding issues of law or discretion, and a proposed order together with relevant references to the record and the initial decision."

40 C.F.R. § 22.30(a)(1) (emphasis added). Because the Region's notice of appeal and motion for extension of time were received by the Board twenty-one days after service of the initial decision, the Board issued an order to the Region to show cause as to why its notice of appeal should not be dismissed as untimely. The Board noted in the order that "absent extraordinary circumstances, a notice of appeal must be *received by the Board* within the deadline set forth in 40 C.F.R. § 22.30(a) in order to be timely." Order to Show Cause at 3 (citing *In re Apex Microtechnology, Inc.*, EPCRA Appeal No. 93-2, at 3-5 (EAB, July 11, 1994) (and cases cited therein)).

In the Region's response to the show cause order, the Assistant Regional Counsel contends that the initial decision was not hand- delivered to him on August 3, 1995, but was placed in the Region's interoffice mail on that date and did not actually arrive at the Office of Regional Counsel (at 200 West Adams Street, Chicago, Illinois) until August 4, 1995.[5] The Assistant Regional Counsel contends that since the Board received the notice of appeal and motion for extension of time on August 24 (twenty days after the initial decision was received by the Office of Regional Counsel) the appeal is timely. We conclude that neither is the appeal timely nor has the Region established "extraordinary circumstances" justifying acceptance of an untimely appeal.

The Consolidated Rules of Procedure contemplate two forms of service for the "rulings, orders, decisions, and other documents" issued by presiding officers. Such documents "shall be served *personally*, or by *certified mail*, return receipt requested." 40 C.F.R. § 22.06 (emphasis added). The date of service of an initial decision triggers the twenty-day period within which an appeal must be perfected. *Id.* § 22.30(a). When an initial decision is served "personally," determining the date of service is a straightforward matter of looking at the date upon which the Regional Hearing Clerk certified that service was made. When an initial decision is served by "mail" (which must be "certified mail" in accordance with § 22.06), the rules provide that service is complete "upon mailing" (again, as evidenced by the certificate of service). *Id.* § 22.07(c). In order to account for variations in the delivery of U.S. mail (the only means, to our knowledge, by which "certified mail" may be delivered), the rules provide that when an initial decision is served by "mail," five days are added to the twenty days allowed by the rules within which to perfect an appeal. *See id.*

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[5]We agree with the Assistant Regional Counsel that the fact that he was on leave on August 4 and did not personally receive the decision until August 7, 1995, is of no consequence.

The Assistant Regional Counsel does not (and cannot, in our view) contend that he was served with the initial decision by "mail" within the meaning of § 22.07(c). Rather, the Assistant Regional Counsel appears to urge the Board to adopt a rule whereby the date of *receipt* of an initial decision triggers the twenty-day appeal period, when the initial decision is served via interoffice mail. We conclude that such a rule is untenable, and would contravene the primary aim of the "computation of time" rules governing appeals to the Board, which is to provide the parties and the Board with certainty in determining when obligations must be fulfilled. The rules were intended to avert the very uncertainty that would be engendered by looking to each party's internal operations to determine when an initial decision was received by counsel for that party.[6] We instead conclude that it is reasonable to construe interoffice mail delivery as a type of service made "personally" as that term is used in 40 C.F.R. § 22.06; service is therefore determined by examining the date upon which the Regional Hearing Clerk certifies that the item was placed in interoffice mail.

We recognize that the term "personal service" is somewhat ambiguous as it relates to service of documents within Region V and other Regions, since interoffice mail systems are commonly used by Regional Hearing Clerks to serve documents within the Regional Offices, rather than hand-delivering documents to specific individuals. Thus, if we were to construe "personal service" to mean only individual hand-delivery from the Regional Hearing Clerk directly to the Regional attorney, then service (within the meaning of § 22.06) can never take place under such circumstances since interoffice mail involves handling by intermediaries. Moreover, if decisions issued by Regional Hearing Clerks are considered served only upon receipt by a Regional attorney, as the Region suggests, then there is no independently ascertainable date of service, in contravention of the intent of the rules, as discussed above. Thus, the only reasonable interpretation of "personal service" for documents sent by the Regional Hearing Clerks to a Regional attorney through interoffice mail systems is that service of such documents is deemed complete upon being placed in interoffice mail, as documented by the Regional Hearing Clerk on the certificate of service.

The certificate of service for the initial decision in this case (the veracity of which is not disputed by the Region) indicates that it was served upon the

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[6]OMC correctly points out that the Administrator has previously held that variations in parties' internal operations are not an appropriate basis for waiving the requirements for perfecting an appeal. *See In re Georgetown Steel Corp.*, 3 EAD 607, at 609-10 (Adm'r 1991).

Assistant Regional Counsel by interoffice mail on August 3, 1995. The Region's notice of appeal and motion for extension of time were received by the Board on August 24, 1995, twenty-one days after service of the initial decision; they are therefore untimely. The Region has identified no "extraordinary circumstances" that would justify any waiver of the twenty-day deadline in this case.[7]

We note that this result could have been easily forestalled by the Region. Because the Region assumed a time computation that is not clearly contemplated by the Consolidated Rules of Procedure, it acted at its peril in delaying to file the notice of appeal and motion. Had it filed one day earlier, the appeal would have been timely, albeit grossly incomplete.

In accordance with the foregoing, Region V's notice of appeal is hereby dismissed. Region V's motion for an extension of time to file its brief and other appeal documents is hereby denied.[8]

So ordered.

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[7] 40 C.F.R. § 22.07(b) provides that motions for an extension of time "shall be filed *in advance of the date*" on which the document for which an extension is sought is due, unless the moving party establishes "excusable neglect" for its failure to make timely motion. The Region's motion for an extension of time was served the day after the final day on which an appeal could be perfected, and the Region does not assert any grounds for finding "excusable neglect" in its failure to file earlier.

[8] In future cases, when a Region wants to ensure that it has the full benefit of the twenty-day filing period, the Regional attorney may wish to make arrangements with the Regional Hearing Clerk to obtain a copy of the initial decision immediately upon issuance (*e.g.* by picking it up in person or having it faxed) rather than simply awaiting its arrival by interoffice mail.